152 215373

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 245.

JULIUS BERBECKER, JOHN J. HENDERSON, AND THOMAS MORRIS, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1890.

(14,260.)

(14,260.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 245.

JULIUS BERBECKER, JOHN J. HENDERSON, AND THOMAS MORRIS, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Notice of appearance and demand	4	2
Writ of certiorari	6	3
Complaint	8	4
Bill of particulars	10	5
Answer	12	6
Minutes of trial	14	7
Judgment	15	7
Bill of exceptions	18	8
Statement of evidence	18	8
Protest	18	8
Testimony of Julius Berbecker	19	8
Defendant's request for verdict and ruling thereon	21	10
Judge's certificate	21	10
Bond	23	10
Assignment of errors	25	11
Joinder in error	27	12
Citation	29	13
Proof of service of citation	30	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1893.

circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 30, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Julius Berbecker, John J. Henderson, and Thomas Morris, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

JULIUS BERBECKER, JOHN J. HENDERSON, THOMAS MORRIS, Plaintiffs,
vs.
WILLIAM H. ROBERTSON, Defendant.
} Summons No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, July 1, 1884.

CHAS. CURIE,
Plaintiffs' Attorney,
Offices, No. 44 Exchange Place, New York City.

3½ [Endorsed:] No. 1. N. Y. superior court. Julius Berbecker & *als.*, plaintiff-, against William H. Robertson, defendant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Due service hereof admitted this — day of ——, 18—. Served July 1, '84.

4 N. Y. Superior Court.

JULIUS BERBECKER
versus
WILLIAM H. ROBERTSON.
} 1. Notice of Appearance and Demand.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of the

complaint and all papers in this action, upon me at my office, in the United States court and post-office building, in the city of New York.

Yours, ELIHU ROOT,
United States Attorney, Attorney for Defendant.

New York, July 5, 1884.
To C. Curie, Esq., attorney for plaintiff-.

5 [Endorsed:] 9228. N. Y. superior court. Julius Berbecker & *al. versus* William H. Robertson. Notice of appearance. Elihu Root, United States attorney, attorney for defendant. To C. Curie, plaintiffs' attorney.

6 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by Julius Berbecker & *als.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 19 day of July, 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 15 day of July, in the year one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

7 [Endorsed:] 9228 U. S. circuit court. Julius Berbecker & *al. vs.* William H. Robertson. Copy certiorari. Edward Mitchell, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, July 15, 1884. Yours, Elihu Root, U. S. attorney, attorney for defendant. To Chas. Curie, Esq., plaintiffs' attorney.

8 Circuit Court of the United States for the Southern District of New York.

JULIUS BERBECKER, JOHN J. HENDERSON, and THOMAS MORRIS, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.
} Complaint.

Plaintiffs complain:

1st. That defendant was during the time hereinafter named collector of customs of the United States at the port of New York.

2d. That plaintiffs were during said times partners in trade under the firm name of Julius Berbecker & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiffs, as and for duties thereon, and plaintiffs, in order to obtain said goods, were compelled to pay, and did pay, the sum of thirty-nine hundred & twenty & $\frac{48}{100}$ dollars in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for thirty-nine hundred and twenty $\frac{48}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

9 [Endorsed:] 9228. U. S. circuit court. Julius Berbecker & *als.*, plaintiffs, against William H. Robertson, defendant. Complaint. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Due service of a copy hereof admitted this 2 day of Aug., 1884. Elihu Root, U. S. att'y.

Name- of importer- (for all the importations), Julius Berbecker & Co.

	Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
				1883.	1883.		1883.	1883.	1883.	
1	Upholstering nails..	Bremen	Main.....	Sept. 4	Sept. 21	9 60	Sept. 21	Dec. 1	Dec. 1	No ans. rec'd.
2	" " ..	" . . .	Nabsburg....	Aug. 6	" 3	52 60	" 3	" 1	" 1	" "
3	" " ..	Hamburg....	Bohemia	" 20	" 11	56 80	" 11	" 1	" 1	" "
4	" " ..	Bremen	Main...	Sept. 4	" 21	319 36	" 21	" 6	" 6	" "
5	" " ..	"	Nabsburg....	Aug. 6	" 3	303 49	" 3	" 6	" 6	" "
6	" " ..	"	Rhein.....	Sept. 3	Oct. 1	717 96	Oct. 1	" 22	" 22	1884.
							1884.	1884.	1884.	June 12.
7	" " ..	"	Elbe	Oct. 4	" 22	302 17	" 23	Jan. 2	Jan. 2	" 12.
8	" " ..	"	Oder	" 4	" 29	656 08	" 29	" 12	" 12	" 12.
9	" " ..	"	Reckar	Nov. 8	Dec. 3	75 00	Dec. 4	" 16	" 16	May 21.
10	" " ..	Hamburg ...	Westphalia ..	" 17	" 6	33 60	" 7	" 24	" 24	" 21.
11	" " ..	Bremen	Fulda	Dec. 5	" 24	262 51	" 26	" 31	" 31	No ans. rec'd.
12	" " ..	"	Gen. Werder.	Nov. 30	" 26	702 33	" 26	" 31	" 31	" "
					1884.		1884.			1884.
13	" " ..	"	Main	Dec. 31	Jan. 22	246 06	Jan. 22	Feb. 18	Feb. 18	May 21.
						3,737 56				

(Extract charges out.)

11 [Endorsed:] 9228. U. S. circuit court, southern district of New York. Julius Berbecker *et al.* against William H. Robertson. Copy. Bill of particulars. New York, ——, 18–. Stephen A. Walker, Esquire, defendant's attorney: Sir—Please to take notice that this action is brought to recover duties illegally exacted by the defendant as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. Stanley, Clark & Smith, plaintiffs' attorney'-, 160 Broadway. Due service hereof admitted this — day of ——, 18—. ——, defendant's attorney.

12 Copy.

Circuit Court of the United States for the Southern District of New York.

JULIUS BERBECKER *et al.*
versus
WILLIAM H. ROBERTSON, Collector, etc. } 9228.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay to the defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with the defendant any protest or protests in writing in which the goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the time therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering, the defendant alleges that all moneys received by him from the plaintiffs, in respect of the importations in the complaint alleged to have been made, were demanded of the plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And further answering, the defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were sums due from the plaintiffs to the United States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

WILLIAM DORSHEIMER,
United States Attorney, Attorney for Defendant.

13 [Endorsed:] 9228. U. S. circuit court, southern district of New York. Julius Berbecker *et al. vs.* William H. Robertson, collector, etc. Copy. Answer. William Dorsheimer, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, Dec. 11, 1885. Chas. Curie, plaintiffs' attorney. To Chas. Curie, attorney for plaintiffs.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 24th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

JULIUS BERBECKER
vs.
WILLIAM H. ROBERTSON. } 9228.

Now comes the plaintiffs, by Stephen G. Clarke, Esq., their attorney, and move the trial of this cause. Likewise comes the defendant, by Macgrane Coxe, Esq., assistant United States attorney, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the respective parties and the argument of counsel, the court directs the jury to find a verdict for the plaintiffs in the sum of two hundred and twenty-nine dollars and fifty-two cents (229.52).

An extract from the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

15 U. S. Circuit Court, Southern District of New York.

JULIUS BERBECKER *et al.*
vs.
WILLIAM H. ROBERTSON. } Judgment. No. 9228.

The above cause having been brought on for trial before the Honorable E. Henry Lacombe, judge of this court, and a jury duly empaneled to try the same on the 24th day of January, in the year one thousand eight hundred and eighty-nine;

And a verdict having thereafter been found by the jury under the direction of the court in favor of the plaintiffs in the sum of two hundred and twenty-nine dollars and fifty-two cents ($229.52);

And the costs herein having been taxed in the sum of forty-
16 six dollars and eighty-five cents ($46.85):

Now, on motion of Charles Curie, Esq., attorney for the plaintiffs herein—

It is adjudged that the plaintiffs, Julius Berbecker, John J. Henderson, and Thomas Morris, have judgment against the defendant, William H. Robertson, in the sum of $229.52 damages, $10.40 interest, and $46.85 costs, making in all the sum of two hundred and

eighty-six dollars and seventy-seven cents ($286.77), and have execution therefore.

Judgment signed this 28 day of October, A. D. 1889.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) No. 9228. U. S. circuit court, southern district of New York. Julius Berbecker *et al. vs.* William H. Robert-
17 son. Judgment-roll. Charles Curie, attorney for plaintiffs, 44 Exchange place, N. Y. U. S. circuit court. Filed Oct. 28, 1889, 3 p. m. John A. Shields, clerk.

18 U. S. Circuit Court, Southern District of New York.

JULIUS BERBECKER, JOHN J. HENDERSON, and THOMAS MORRIS
vs.
WILLIAM H. ROBERTSON.
} Bill of Exceptions.

Afterward and on the 24th day of January, 1889, at a stated term of this court held in the city of New York, the issues in this case came on for trial before the Honorable E. Henry Lacombe, a judge of this court, and a jury duly empaneled to try the issues therein.

The plaintiffs, to maintain the issues on their part, introduced in evidence entries and invoices of nails imported by the plaintiffs at various times during the years 1883 and 1884, upon which it appeared in evidence that duty was paid at the rate of forty-five per cent. ad valorem.

It further appeared that as to all the entries in question the plaintiffs in due time protested to the collector and appealed to the Secretary of the Treasury and afterwards brought this suit. The substance of the protest is as follows:

To collector of customs, New York.

SIR: We hereby protest against your decision and assessment of duties as made by you and the payment of more than 4c. per pound or 35 % on the gilt-head ones on our importations below mentioned, consisting of certain hob. wire or wrought-iron nails with plated or gilt headed for upholsterers' use, claiming that under existing laws and particularly by Sch. "C," act M'ch 3, '83, said
19 goods are liable at no more than 4c. per pound as nails, n. o. p. f., or at 35 % ad val. as plated or gilt ware and not at 45 % ad val., or as charged by you, and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion," &c.

Plaintiffs also introduced in evidence samples of the goods in question.

JULIUS BERBECKER, one of the plaintiffs, being called as a witness and duly sworn, testified as follows:

I am interested in manufacturing. I have been in manufactories abroad, and have seen these goods made and know how it is done.

The heads of the nails are tumbled in barrels of water and chemicals to give them a nice gold color. Before they go into the barrels they are the natural color of brass. These samples are known in trade and commerce as gilt nails and are bought and sold as such.

Being cross-examined by counsel for defendant:

I cannot describe the exact color of brass except I went into a brass mill and showed you a piece of brass. (Referring to a nail in a board:) If I saw it at a distance I should probably say it was brass, but still it does not look like the nails before they go into the barrel. Before they go into the barrel there is no lustre on them, or very little. I do not see anything here that looks like the sheet brass of which the nails are made. With regard to the contents of the barrel referred to by me in my direct examination as "water and chemicals," I do not care to state what the chemicals are,
20 because it is a trade secret, but I am willing to state it to the judge alone, so that nobody else hears it. It is a liquid substance of the color of water. It looks like water and nothing else. The process through which these exhibits are put is called by some polishing; not polishing by means of rubbing, but it is done by friction, by the shaking of them up, by the rolling of the nails in the barrel. The length of time they are rolled depends upon what color you want to get on them; sometimes an hour, sometimes two hours, and sometimes it takes longer. I roll them until I get the color I want. Increased rolling tends to darken the color sometimes and sometimes to lighten it.

These nails are bought and sold in this country under the name of gilt nails. That is the proper name for these. They may be sometimes sold under another name, but meaning a gilt nail of first and second quality. We do not sell them as upholstery nails. I cannot tell what other parties do. I cannot swear to that. I know only how they are labelled, and if by accident they should be billed as upholstery nails I should consider it a mistake. I cannot swear that they are not bought and sold in trade and commerce of this country as upholstery nails, because I do not know what other parties do. I can only speak for myself and at the same time as to what is the general usage in the trade. The general usage has been, I know, as long as I have been in the business, whenever a person asked me what was the price of nails, of gilt nails, or they
21 might have asked for upholstery nails, I knew that they meant gilt nails. They are bought and sold in this country under the name of gilt nails. They may possibly have been ordered from a large dealer by a dealer in this country under the name of "upholstery nails." They are sometimes bought and sold in trade and commerce of this country as "French nails," "chair nails," and as "furniture nails."

Defendant's counsel then moved to strike out the testimony as to the fact that they were called "gilt nails." The court granted the motion, and plaintiffs' counsel duly excepted, and the exception was duly allowed.

Plaintiffs thereupon rested, and counsel for the defendant moved the court for the direction of a verdict for the defendant upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt or not to have gold upon them, which motion the court then and there granted and directed the jury to find a verdict for the defendant; to which ruling and direction the counsel for the plaintiffs then and there duly excepted, and the exception was allowed, and the jury thereupon found a verdict for the defendant.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear upon the records of the trial, therefore, upon the prayer of the plaintiffs, by their counsel, said judge has signed and sealed the foregoing as and for the bill of exceptions in this case as of the 24th day of January, 1889.

E. HENRY LACOMBE.

22 Consented to.

CHAS. CURIE, *Att'y for Pl'ff.*

Consented to.

EDWARD MITCHELL,
U. S. Att'y and Att'y for Def't.
M. C.

Endorsed: No. 9228. U. S. circuit court, southern dist. of New York. Julius Berbecker *et al. vs.* William H. Robertson. Bill of exceptions. Charles Curie, attorney for plaintiffs, 44 Exchange place, N. Y. city. U. S. circuit court. Filed Oct. 28, 1889. John A. Shields, clerk.

23 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JULIUS BERBECKER, JOHN J. HENDERSON, and THOMAS MORRIS
vs.
WILLIAM H. ROBERTSON.
} Bond for Damages and Costs.

Know all men by these presents that we, Julius Bernbecker, as principal, and Anthony J. Woodruff, as surety, are held and firmly bound unto the above-named William H. Robertson in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to increase the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JULIUS BERBECKER, [L. S.]
65 *Duane St.*
A. J. WOODRUFF, [L. S.]
69 *William St.*

Sealed and delivered and taken and acknowledged this 11 day of March, 1890, before me—

WILLIAM H. NORTHUP,
[L. S.] *Notary Public, Kings Co.*

Certificate on file in New York county.

24 [Endorsed:] 9228. U. S. circuit court, southern district of New York. Julius Berbecker *et al. vs.* William H. Robertson. Bond for costs on writ of error. Charles Curie, att'y for pl'ffs in error. Approved as to form, amount, and sufficiency of surety. E. Henry Lacombe. U. S. circuit court. Filed March 14, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Julius Berbecker and Anthony J. Woodruff, being duly sworn, each for himself depose- and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JULIUS BERBECKER, [L. S.]
65 *Duane St.*
A. J. WOODRUFF, [L. S.]
69 *William St.*

Sworn to this 11th day of March, A. D. 1890, before me—

WILLIAM H. NORTHUP,
[L. S.] *Notary Public, Kings Co.*

Certificate on file in New York county.

25 Supreme Court of the United States.

JULIUS BERBECKER *et al.*, Plaintiffs in Error,
vs.
WILLIAM H. ROBERTSON, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Charles Curie, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for

Plaintiffs thereupon rested, and counsel for the defendant moved the court for the direction of a verdict for the defendant upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt or not to have gold upon them, which motion the court then and there granted and directed the jury to find a verdict for the defendant; to which ruling and direction the counsel for the plaintiffs then and there duly excepted, and the exception was allowed, and the jury thereupon found a verdict for the defendant.

And inasmuch as the foregoing matters of law and fact and the several exceptions taken, made, and allowed do not appear upon the records of the trial, therefore, upon the prayer of the plaintiffs, by their counsel, said judge has signed and sealed the foregoing as and for the bill of exceptions in this case as of the 24th day of January, 1889.

E. HENRY LACOMBE.

22 Consented to.

CHAS. CURIE, *Att'y for Pl'ff.*

Consented to.

EDWARD MITCHELL,
U. S. Att'y and Att'y for Def't.
M. C.

Endorsed: No. 9228. U. S. circuit court, southern dist. of New York. Julius Berbecker *et al. vs.* William H. Robertson. Bill of exceptions. Charles Curie, attorney for plaintiffs, 44 Exchange place, N. Y. city. U. S. circuit court. Filed Oct. 28, 1889. John A. Shields, clerk.

23 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JULIUS BERBECKER, JOHN J. HENDERSON, and THOMAS MORRIS
vs.
WILLIAM H. ROBERTSON.
} Bond for Damages and Costs.

Know all men by these presents that we, Julius Bernbecker, as principal, and Anthony J. Woodruff, as surety, are held and firmly bound unto the above-named William H. Robertson in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 11th day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to increase the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JULIUS BERBECKER, [L. S.]
65 *Duane St.*
A. J. WOODRUFF, [L. S.]
69 *William St.*

Sealed and delivered and taken and acknowledged this 11 day of March, 1890, before me—

WILLIAM H. NORTHUP,
[L. S.] *Notary Public, Kings Co.*

Certificate on file in New York county.

24 [Endorsed:] 9228. U. S. circuit court, southern district of New York. Julius Berbecker *et al. vs.* William H. Robertson. Bond for costs on writ of error. Charles Curie, att'y for pl'ffs in error. Approved as to form, amount, and sufficiency of surety. E. Henry Lacombe. U. S. circuit court. Filed March 14, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Julius Berbecker and Anthony J. Woodruff, being duly sworn, each for himself depose- and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JULIUS BERBECKER, [L. S.]
65 *Duane St.*
A. J. WOODRUFF, [L. S.]
69 *William St.*

Sworn to this 11th day of March, A. D. 1890, before me—

WILLIAM H. NORTHUP,
[L. S.] *Notary Public, Kings Co.*

Certificate on file in New York county.

25 Supreme Court of the United States.

JULIUS BERBECKER *et al.*, Plaintiffs in Error,
vs.
WILLIAM H. ROBERTSON, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Charles Curie, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for

the said plaintiffs in error against the said defendant in error for a less sum than by the law of the land ought to have been given to the said plaintiffs against the said defendant, and that there was error in the directing of a verdict for the defendant and in the other rulings excepted to in the aforesaid bill of exceptions.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that (they), the said plaintiffs, may be restored to all things which (they) (have) lost by occasion of said judgment. &c.

26 [Endorsed:] 9228. United States Supreme Court. Julius Berbecker *et al.*, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Assignment of error. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 15th day of March, 1890. Edward Mitchell, U. S. attorney, attorney for def't in error. To ——— ———, attorney for — in error. U. S. circuit court. Filed Mar. 15, 1890. John A. Shields, clerk.

27 Supreme Court of the United States.

JULIUS BERBECKER *et al.*, Plaintiffs in Error,
vs.
WILLIAM H. ROBERTSON, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, U. S. att'y, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.

28 [Endorsed:] 9228. United States Supreme Court. Julius Berbecker *et al.*, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 17th day of March, 1890. Charles Curie, attorney for plaintiff- in error. To Charles Curie, Esq., attorney for plaintiffs in error. U. S. circuit court. Filed Mar. 17, 1890. John A. Shields, clerk.

29 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Julius Berbecker *et al.* are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated N. Y., March 14th, 1890.

E. HENRY LACOMBE.

30 [Endorsed:] E. & A. A. 901. 9228. U. S. Supreme Court. Julius Berbecker *et al.*, plaintiffs in error, against William H. Robertson, defendant in error. Citation. Charles Curie, attorney for plaintiff- in error. Due service of a copy of the within citation is hereby admitted this 15th day of March, 1890. Edward Mitchell, P., U. S. attorney, attorney for defendant in error. 25 ch.

[File-mark:] U. S. circuit court. Filed March 15, 1890. John A. Shields, clerk.

Endorsed on cover: Case No. 14,260. S. New York C. C. U. S. No. 245. Julius Berbecker, John J. Henderson, and Thomas Morris, plaintiffs in error, *vs.* William H. Robertson, collector of the port of New York. Filed October 13, 1890.

Office Supreme Court U. S.
FILED.
JAN 22 1894
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1893.

JULIUS BERBECKER ET ALII

vs.

WM. H. ROBERTSON.

No. 245.

PLAINTIFFS' BRIEF.

Statement.

Between Sept. 21, 1883, and January 22, 1884 (Rec. 5) plaintiffs imported into New-York quantities of gilt-headed wire nails, for nailing gimp to furniture, and like purposes.

In the process of their manufacture, a completed wire nail has a gilt head moulded, or fastened, to it.

The heads of some of plaintiffs' nails were gilded by the actual employment of gold; others—which, in the progress of this cause, have become the sole subject of this litigation—had heads composed of brass, so manipulated as to very closely resemble those to which gold was applied; consequently, they *indisputably* had acquired the name of "gilt nails" in trade and commerce. *(Id. 9.)*

When the defendant-collector's attention was called to the subject, he found three provisions of the act of

1883, either of which, standing alone, might be taken as affixing the rate of duty to these goods.

First.—"Horse-shoe nails, hob-nails and *wire nails;* and all other wrought iron (or steel) nails, not specially enumerated or provided for in this act, four cents a pound." (22 Stats., 498 bot.)

Second.—"Britannia ware, and plated and *gilt articles and wares of all kinds*, thirty-five per centum *ad valorem.* *(Id.* 501.*)*

Third.—"Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem.* *(Ibid.)*

The collector applied this last clause to our goods. (Rec. 8, fol. 18.) Plaintiffs protested that one or the other of the preceding clauses gave the applicable rate *(Ib.* fols. 18, 19*)* and took all necessary steps to bring that question before this Court. *(Ibid:* 8 to 10 and 1.*)*

At the trial, it was conceded that the collector was wrong as to those nails having heads to which gold had been applied; consequently we had judgment for the excessive exaction upon these nails. (Rec. 10 top, and 7 bottom.) From this judgment, the government sued out no writ of error.

There was no dispute about the facts; consequently, Mr. Berbecker was the only witness, the United States not seeking to impeach, or qualify, his testimony.

Confining the issue and the testimony to the nails to which gold was not actually applied, the witness testified;—

"The heads of the nails are tumbled in barrels of water and chemicals to give them a nice gold color. Before they go into the barrels, they are the natural color of brass.

"*These samples are known in trade and commerce as 'gilt nails' and are bought and sold as such*". (Rec. 9 top.)

Again, at the middle of same page, upon cross-examation ;—

"These nails are bought and sold in this country under the name of 'gilt nails'. That is the proper name for these. They may be sometimes sold under another name, but meaning a gilt nail of first and second quality." (Rec. 9 middle.)

There were further repetitions of this statement, as the cross-examination was continued. (Rec. 9 lower half.)

The testimony closed with the statement;—"They are sometimes bought and sold in trade and commerce of this country as 'French nails,' 'chair nails', and as 'furniture nails'." *(Ibid.)*

"Defendant's counsel then moved to strike out the testimony as to the fact that they were called 'gilt nails'." (Rec. 9 bottom.)

This motion was granted, and the plaintiffs were allowed an exception. *(Ibid.)*

"Plaintiffs thereupon rested, and counsel for the defendant moved the court for the direction of a verdict for the defendant upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt (or not to have gold upon them); which motion the Court then and there granted, and directed the jury to find a verdict for the defendant; to which ruling and direction the counsel for the plaintiffs then and there duly excepted, and the exception was allowed;—and the jury thereupon found a verdict for the defendant." (Rec. 10 top.)

Assignment of Errors.

The plaintiffs in error assign for error;—

First. The granting of defendant's motion "to strike out the testimony as to the *fact* that they [the importations in question] were called 'gilt nails'". (Rec. 9 bottom.)

It had been proved upon direct examination that plaintiffs' importations, of which samples were exhibited, were "known in trade and commerce as 'gilt nails', and are bought and sold as such". (Rec. 9 top.)

This was re-iterated upon cross-examination *(Ib.*, middle*)* upon the close of which the above-mentioned motion to strike out was made and granted. This was error, and we so assign it.

Second. The granting of defendant's motion for a direction in his favor "upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt, or not to have gold upon them"; and the direction given to the jury to find for the defendant accordingly, as to such nails. (Rec. 10 top.)

Third. The directing and giving of a verdict for said plaintiffs against said defendant for a less sum than, according to the law of the land, ought to have been awarded to the said plaintiffs against said defendant. (Rec. 7 middle to 10, top; 11-12.)

Fourth. The verdict rendered, by direction of the Court, for the plaintiffs for but $229.52 damages; when their actual damage was proved to be more. (Rec. 7 middle; 10 top.)

Fifth. The judgment for the plaintiffs against the defendant for but $229.52 damages, upon the verdict so erroneously directed, as aforesaid. (Rec. 7 bottom.)

POINTS.

I.

Wire-nail clause.

If the *use* of the article—the purpose for which it is manufactured and employed—controls its classification, ours was entitled to come in as wire nails, wrought iron nails, at four cents a pound.

That is what they are, pure and simple, until the polished head is put on, more for ornamentation than use; then, they are gilt-headed nails;—nails, the essential, useful, part of which is wrought-iron wire.

Under the 'spectacles' case, this would seem to be the controlling element.

Arthur v. Sussfield, 96 U. S. 128.

II.

Gilt articles.

By the Court and by both counsel, the gilding—which gives a distinguishing name and appearance to the article, separating it from other nails, and setting it apart for a narrower and more special use—was accepted at the trial as determining the rate of duty with which the article should be assessed.

As to those nails to the heads of which gold had been applied, it was conceded the defendant had erred in his exaction of duty; and, upon these, we had a directed verdict and judgment for the ten per cent difference between the duty assessed (45%) and that which should have been laid (35%) thereon. (Rec. 7, and 10 top. *Ante*, p. 2, middle.)

It is matter of common knowledge that those articles called 'gilt' are such as have only their more exposed surfaces gilded; and, in those cases where the leaf is not mechanically applied, the gold is mixed with other substances, to facilitate its application, and to increase its durability.

An article entirely gilt would be of gold, and so designated. The force of customary language, and the associations of this clause, indicate as the subject of duty, those things which have the prominently-exposed surface gilded.

Arthur v. Butterfield, 125 U. S. 76, 77.

III.

Trade-meaning.

The issue decided by the Court against us, and in favor of the defendant, *as matter of law*, was as to our *right* to claim the benefit of the clause, dutying "gilt wares and articles," for such nails as had not had any gold applied to their heads; but which so strongly resembled those which had been thus treated, and so completely subserved the same use, that they had come to be known in trade and commerce as "gilt nails," and were dealt in accordingly.

Our ability to establish this usage, if permitted to do so, was not questioned; but it was decided that it was not competent for us to do so, nor pertinent to the issue.

In this case, Judge LACOMBE simply adhered to the general idea which determined his disposition of the next-preceding case upon this term's calendar, No. 244, Maddock v. Magone. Our brief in that case is largely applicable to this. There, the question was

whether small china plates, etc., not found as a fact to come within a stated definition of 'toys,' could be brought within it, for dutying purposes, by proof of commercial usage embracing them within this term. The Judge held that, unless the jury found the ABC plates, etc., to be 'toys' as he had defined the word, the verdict must be controlled by the fact that the component material was china. Here, he held that if the 'gilt' head was not one to which gold was applied, the component material must govern, exclusive of any commercial usage treating such nails as gilt.

In both cases, he makes the ordinary, common meaning paramount to and exclusive of any meaning acquired by the usage of trade and commerce.

This we deem contrary to the tenor of all the decisions of this Court upon this subject.

"These samples are known in trade and commerce as 'gilt nails' and are bought and sold as such. . . . . These nails are bought and sold in this country as 'gilt nails'. That is *the proper name* for these. . . They are bought and sold in this country under *the name* of 'gilt nails'." (Rec. 9.)

This usage we claim to be controlling, for the purpose of assessing duty.

That it is not a trumped-up, or absurd, extension of the original meaning can be seen by reference to any old edition (A. D. 1849) of Webster's Dictionary, where the second definition is—"2. To cover with *any* yellow matter." One of the first definitions of Webster's Imperial Dictionary is ;—"*To cause to look like gold.*"

The Century Dictionary gives this definition ;—

"2. To gives the appearance of gold to, *whether by means of actual gold leaf, or in some other way*, as by lacquering polished brass," etc.

Gilding. "2. The art or practice of producing the appearance of gilding, by the use of *other materials than gold.*" (Cent. Dict.)

Speaking of gilding brass buttons, by the amalgam process, Brande says "the requisite quantity of gold is so small that twelve dozen buttons, of one inch diameter, may be completely gilt, upon both surfaces, by five grains of gold." Ency. of Science, 516.

The gold value, then, amounts to little over a mill apiece upon *such* a button; and the chances are that later improvements have reduced it.

The difference in intrinsic, or market, value between articles actually gilt and those commercially so considered would hardly seem to require a discriminating ten-per-centum difference in the rate of duty.

These remarks are to remind how easily the common as well as the commercial meaning may be expanded to include things possessing, to a degree nearly or quite equalling the original, that quality which is the chief characteristic of gilt..

They are superfluous, however, if we rightly apprehend the extent of the principle that the commercial meaning, whatever its source or however acquired, is the controlling one.

The issue here between us and our opponents (endorsed by the Court below) is that *we* say the clearly-established commercial meaning of gilt articles must be the statutory meaning of the term, in this clause of the tariff: while *they* say the commercial meaning—the existence of which they do not controvert—is absolutely immaterial and impertinent; and that the clause is restricted, *ex vi termini*, to articles upon whose surface some auric particles have diffused their lustre.

"We think the Court erred in this instruction. The commercial designation, as we have frequently decided, is the *first* and *most important* designation to be ascertained in settling the meaning and application of the tariff laws. [Citing cases.] But *if the commercial designation fails* to give an article its proper place in the classifications of the law, *then* resort must necessarily be had to the common designation." (130 U. S. 415 mid.)

The Court had already said, top of same page;—

"The common designation, as used in every-day life . . . *would* have been very proper to be shown, in the *absence* of further light from commercial usage."

Robertson v. Salomon, 130 U. S. 415.

"*If the commercial designation of the article gave it its proper place in the classification of the statute,* RESORT TO THE COMMON DESIGNATION WAS UNNECESSARY AND IMPROPER."

Toplitz v. Hedden, 146 U. S. 256 bot.

The sense in which the term is taken in the particular trade dealing in the merchandise imported is that in which it is employed by the statute.

Hedden v. Richard, 149 U. S. 348–9.

It is not the denomination of a single article of commerce—like 'glue' and 'beeswax' which head Schedule A, act of 1883—but, pre-eminently manufactures and things described as of a specified material, that require clauses referring to them to be construed in a commercial sense.

"Manufactures of steel"; of glass; of cotton; of wool; worsted; hair, etc., etc; *articles,* of rubber; leather, etc., etc.; are designations of articles (of the enumerated articles) admitting evidence of commercial usage, to apply them to the proper subject.

Arthur v. Butterfield, 125 U. S. 76, 77,
citing Same v. Sussfield, 96 *Id.* 128.
Junge v. Hedden, 146 Id. 238.
Arthur v. Cumming, 91 *Id.* 363.

Naphthylamine red, resorcine red, etc. were proved *not* to be aniline dyes or colors *in fact;* but held to be dutiable as such, *solely* because they were shown to be *commercially* so considered; the statutory phrase being "aniline colors and dyes, by whatever name known"; —which importer's able counsel contended excluded commercial understanding; that the *name* or designation had naught to do with the matter; but only the question, whether the goods were *actually* aniline or

not. This Court ruled otherwise, affirming the judgment below.

Pickhardt v. Merritt, 132 U. S. 254–7.

In the next preceding case (No. 244) we have mentioned that in the terminology of marine insurance, the word 'furniture' includes "provisions';—a construction that would make a cabinet-maker gasp.

Brough v. Whitmore, 4 T. R. 206.

And that sarsaparilla-root is not included within the term "roots."

Coit v. Com'l., 7 Johns. 385.

We have also referred to the oft-cited cases, construing the terms "silk laces" and "silk veils" as not including laces and veils every fibre of which was silk; because neither were so known commercially, but as 'crape veils' and 'thread laces'—the primary meaning of 'thread' being *linen*.

Arthur v. Lahey, 96 U. S. 112.
Same v. Morrison, *Ibid.* 108.
Lottimer v. Smythe, 17 Int. R. Rec. 14, approved, 96 U. S. 110.

The closing sentence of the testimony about our goods was;—"They are sometimes bought and sold in trade and commerce of this country as 'French nails,' 'chair nails' and as 'furniture nails'." (Rec. 9 bottom.)

Immediately, defendant moved to strike out the testimony that they were called 'gilt nails,' and that motion was granted. *(Ibid.)* Whether we are justified in applying the '*post-hoc, proper-hoc*' argument here, we do not know. Probably not. But we cannot see that the circumstance thus proven had anything to do with the merits. 'Torchon' laces, known by that class name, but never bought and sold by it, or otherwise than as 'Smyrna' or some such designation indicating the style, were held dutiable as 'thread laces,' because commercially belonging to that general class. As above

noted, 'naphthylamine red,' 'resorcine red,' etc., bought and sold by these specific names, were dutiable as 'aniline colors or dyes' because so known commercially, contrary to the fact; so goods bought and sold as 'astrâchâns', though having a pile, and known to *manufacturers* as a 'pile fabric' were held not dutiable as "pile fabrics" because not so understood *commercially.*

Smith v. Field, 105 U. S.
Pickhardt v. Merritt, 132 *Id.*
U. S. v. Herrmann, 56 F. R. 478, decision of U. S. C. C. of Ap.

IV.

Testimony struck out.

The granted motion "to strike out the testimony as to the fact that they were *called* 'gilt nails'" (Rec. 9 bottom) does not indicate with exact precision what was struck out, and how much remained upon the record.

Near the commencement of his testimony, the witness had said; "These samples are known in trade and commerce as 'gilt nails,' and are bought and sold as such." (Rec. 9 top.)

If *this* was struck out, we have good ground of exception, unless it be here held that commercial usage and nomenclature have nothing to do with the case. With this and similar testimony in the case, it was error to direct a verdict against us, as to these goods; except upon this same construction prevailing, that the most restricted definition of 'gilt'—confining it absolutely to the material gold—must be assigned to the word in this clause, regardless of any more comprehensive meaning, prevalent in trade and commerce.

The motion, at the time and in the manner in which it was made, was improper; and it was an abuse of discretion amounting to error, to grant it. The purport of it was manifest when received, so the failure then to object could not be inadvertent. The motion was improperly granted because of its vagueness; as well as because of its purpose to have competent testimony erased from the record.

V.

Directed verdict.

Upon the competent evidence of trade usage, it was error to direct a verdict for the defendant. (Rec. 10 top.)

Holding the view that the *fact*, 'gilt' or 'not gilded', controlled all usage, or commercial nomenclature, it would have been proper for the Court to have allowed us to present that question here, by a direction to disregard the testimony of trade-meaning, or by directing a verdict ignoring the existence of such evidence upon the record.

But, as we excepted both to the striking out and to the direction (Rec. 9, 10) it all comes to the same thing.

We object to the granting of the motion to strike out, because the testimony struck out was relevant and competent. We object to the direction, based upon the fact that pertinent and competent testimony, requiring a different verdict, had been stricken out.

The error in this direction is shown by what has been hereinbefore said as to the paramount force of trade-meaning; its priority of right to be *first* consid-

ered, and its exclusion of every other meaning, if once established.

VI.

The judgment of the Court below should be reversed with costs.

EDWIN B. SMITH,
120 Broadway,
New York,
Of Counsel for plaintiffs.

Office Supreme Court U.S.
FILED.
JAN 29 1894
JAMES H. McKENNEY,
CLERK.

CASE NO. 14260.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JULIUS BERBECKER ET AL., PLAINTIFFS IN ERROR,
v.
WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.
} No. 245.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JULIUS BERBECKER ET AL., PLAINTIFFS IN ERROR,
v.
WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK. } No. 245.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

This was an action to recover duties paid under protest upon an importation of brass nails. The importations were made in 1883, so that the case is governed by the tariff law of that year. The plaintiffs in error are the plaintiffs below. They recovered a judgment, but a judgment for less than the amount claimed. As to the balance of their claim, a verdict was directed for the defendant. The court delivered no opinion upon directing the verdict.

STATEMENT OF FACTS.

The articles imported were brass nails dipped in a chemical solution to look gilt, but not actually gilt. In the

bill of particulars they were called "upholstering nails." The only witness was one of the plaintiffs, who declined to state what the chemicals used really were. He swore that the samples which he produced were known in trade as *gilt nails;* but this testimony was stricken out by the court after his cross-examination.

Plaintiff in his brief says that the nails were of wrought-iron wire with brass heads. There is no such proof. Plaintiff testified that they were made of "sheet brass."

The collector rated these articles as manufactures of metal not otherwise provided for, under paragraph 216:

> Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per cent ad valorem.

Plaintiffs claimed that the articles were dutiable "at no more than 4 c. per pound as nails n. o. p. f." under paragraph 168:

> Horseshoe nails, hob nails, and wire nails, and all other wrought-iron or steel nails not specially enumerated or provided for in this act, four cents per pound.

or, "at 35 % ad. val. as plated or gilt ware," under paragraph 210:

> Britannia ware, and *plated and gilt articles* and wares of all kinds, thirty-five per cent ad valorem.

Judge Lacombe, in an opinion delivered upon a question of evidence, as appears in the stenographer's minutes

of the trial, concedes (as we do not) that a "gilt" article need not be actually covered with gold, but says:

> Evidently, from the dictionary meaning—and if there is any different dictionary meaning I would like my attention called to it—but looking at the dictionary meaning of the word "gilt," and also at the dictionary meaning of the word "plated," they both evidently contemplate a process of manufacture which involves the overlaying of one material with another.

I.

The first exception is to the ruling of the court in granting defendant's motion "to strike out the testimony as to the fact that they were called 'gilt nails.'"

Plaintiff had sworn on direct examination as follows:

> These samples are known in trade and commerce as gilt nails, and are bought and sold as such.

His cross-examination upon this point was as follows:

> These nails are bought and sold in this country under the name of gilt nails. That is the proper name for these. They may be sometimes sold under another name, but meaning a gilt nail of first and second quality. We do not sell them as upholstery nails. I can not tell what other parties do. I can not swear to that. I know only how they are labeled, and if by accident they should be billed as upholstery nails I should consider it a mistake. I can not swear that they are not bought and sold in trade and commerce of this country as upholstery nails, because I do not know what other parties do. I can only speak for myself, and at the same time as to what is the general usage in the trade. The gen-

> eral usage has been, I know, as long as I have been in the business, whenever a person asked me what was the price of nails, of gilt nails, or they might have asked for upholstery nails, I knew that they meant gilt nails. They are bought and sold in this country under the name of gilt nails. They may possibly have been ordered from a large dealer by a dealer in this country under the name of "upholstery nails." They are sometimes bought and sold in trade and commerce of this country as "French nails," "chair nails," and as "furniture nails" (p. 9).

The court seems to have granted the motion to strike out upon two grounds, first, that the evidence is insufficient to establish a trade designation sufficient to send the question to the jury; second, that even if brass nails were called "gilt nails" in the trade, they would not be "gilt articles and wares" within the meaning of the tariff law, not being gilt in fact.

(A) *Insufficiency of evidence to prove commercial usage.*

It may be conceded that the phrase "gilt nails," if used in the tariff law, would be subject to evidence of commercial designation. (*Cadwalader* v. *Zeh*, 151 U. S., and cases cited.) We do not propose to argue this question in support of the judgment.

It is, however, well settled that the commercial designation at the time of the trial, or at any other time subsequent to the passage of the act under construction, is immaterial, and that a question relating to the usage at the time of the trial will be excluded as irrelevant. (*Cadwalader* v. *Zeh*, *supra*, last paragraph of opinion.) This trial was in 1889, nearly six years after the act.

It is well settled on the other hand, moreover, that the party claiming the benefit of a commercial designation has the burden of proof. Presumptively, the trade meaning is the colloquial meaning (*Swan* v. *Arthur*, 103 U. S., 597), and the presumption is that the collector's decision is correct. (*Arthur* v. *Unkart*, 96 U. S., 118.)

A commercial designation is one species of commercial usage. There seems to be no assignable reason why its proof should not be governed by the same principle as proof of other trade usages. There is no authority holding the contrary. On the other hand, the authorities in the lower courts sustain this position, applying to this case the general principle that the usage must be uniform. (*Dodge* v. *Hedden*, 42 Fed. Rep., 446; *In re Blumenthal*, 49 Fed. Rep., 226.) The point here discussed was raised by the undersigned, though less fully treated, in the case of *Cadwalader* v. *Zeh*, above cited. But the court did not pass upon the question, which, as we assume, they regarded as not raised at the trial by sufficiently specific exceptions.

As to the nature and proof of commercial usage, no distinction has been made between the case of statutes and that of contracts, although it is in cases arising upon contract that the question has been most commonly discussed. A usage to have the force of law must be uniform as well as certain. (Endlich on Interpretation of Statutes, § 362; *Garrison* v. *Memphis Insurance Company*, 19 How., 312, 317; *Rapp* v. *Palmer*, 3 Watts, 178; *Collings & Company* v. *Hope*, 3 Wash. C. C., 149; *Foye* v. *Leighton*, 22 N. H., 71, 76, and cases cited; *Butler* v. *City of Charlestown*, 7 Gray, 12, 16; and cases below cited.)

If the testimony tends to prove a custom, but does not tend to prove that the custom is uniform and certain, it should not be submitted to the jury. (*Citizens' Bank* v. *Grafflin*, 31 Md., 507, 520; *United States* v. *Buchanan*, 8 How., 83, 102; *Adams* v. *Pittsburg Insurance Company*, 76 Pa. St., 411; *Schurr* v. *Savigny*, 85 Mich., 144; *Dickinson* v. *City of Poughkeepsie*, 75 N. Y., 65, 77.) In all of these cases the question on appeal was whether the trial court erred in submitting the evidence to the jury, or was justified in withholding it.

In *Bowling* v. *Harrison*, 6 How., 248, Mr. Justice Grier says:

> The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage. It is true, the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion. * * * A usage, to be binding, should be definite, uniform, and well known; it should be established by clear and satisfactory evidence.

The latest application of the rule is by the circuit court of appeals for the sixth circuit in *Greenwich Insurance Company* v. *Waterman*, 54 Fed. Rep., 839, concurred in on this point by Jackson, Taft, and Hammond, JJ. In this case Judge Taft said:

> The difficulty we have in supporting the judgment below is * * * insufficiency of the evidence to show the local usage relied on by the plaintiffs. * * * Whether a usage exists is for the jury on conflicting

evidence; but before the jury can be allowed to consider the question, there must be some evidence tending to establish a well-defined usage, uniform and notorious. There was no evidence of this kind in this case. The question of usage should not have been submitted to the jury. The court erred in so doing.

A mere *scintilla* of evidence would not be sufficient for the party on whom lies the burden of proof. If the evidence is so slight that a verdict based thereon would be set aside, it is the duty of the court to withdraw it from the jury (*Pleasants* v. *Fant*, 22 Wall., 116; *Herbert* v. *Butler*, 97 U. S., 319; *Robertson* v. *Edelhoff*, 132 U. S., 614, 626, and cases cited); a course commonly taken in negligence cases (*Quebec Steamship Co.* v. *Merchant*, 133 U. S., 375; *Gunther* v. *Liverpool, &c., Insurance Co.*, 134 U. S., 110, 116; *Elliott* v. *Chicago, &c., Railway*, 150 U. S., 245, and cases cited.) The motion here granted to strike out the evidence for insufficiency was equivalent to an instruction that the jury refrain from considering it; for no further testimony on the point was offered. Each of these methods of raising the point is substantially the equivalent of a demurrer to the evidence.

Plaintiff objects to the motion and ruling as too vague. They are quite as definite as such motions and rulings usually appear upon the record. If plaintiff feared an ambiguity, he should have asked to have the motion made more definite and certain. Certainly the matter struck out does not include any unobjectionable testimony. If it fails to include all the objectionable testimony, then the defect was cured by the direction of the verdict in favor of defendant upon this branch of the case.

Plaintiff also claims that the motion should have been made upon the direct examination of the witness. But it was not till the witness had been cross-examined that the insufficiency of his testimony became manifest. Where statements on direct examination appear competent, but are really incompetent, it is a proper practice, and in New York a usual practice, subsequently to show the incompetency by examination or otherwise, and then move to strike out (*Whitman* v. *Foley*, 125 N. Y., 651, 659). Such a motion is addressed to the discretion of the court (1 *Thompson on Trials*, § 716), even if objection could and should have been made at once (*Matter of Lasak*, 131 N. Y., 624, 628.)

The doctrine of waiver invoked by plaintiff applies only to objections on the ground of incompetency. Even were it necessary to demand affirmative proof of the competency of the witness on his direct examination, and were it a waiver to reserve this line of inquiry for the cross, still the two defects in relevancy would not be cured,—failure to show the custom to be uniform and universal, and failure to show its contemporaneousness with the Tariff Act of 1883.

Nor are such technical points favored when made by plaintiff in error, for the purpose of upsetting the judgment. Bills of exceptions are not so made up as to enable the appellate tribunal to judge fairly as to such claims of *laches* on the part of the successful party. For instance, suppose the stenographer's minutes of the trial had shown some such proceedings as these, on direct examination:

> Q. (By Mr. CLARKE.) What is the trade designation?

Mr. COXE. That is objected to as immaterial and incompetent.

The COURT. I will take the testimony in order to make the record more complete.

A. Gilt nails.

Mr. COXE. I move to strike out the testimony.

The COURT. I will reserve that motion until the close of the examination of this witness.

Would not all this have been omitted in making up the bill of exceptions as altogether unnecessary, and therefore improper?

The testimony in this case not only fails to show any uniform and certain custom in the city of New York, but does show that nothing amounting to a custom within the meaning of the law can possibly exist; for the nails in question are made only by the plaintiffs. The chemicals which give them the gilt appearance plaintiffs refuse to disclose to the jury "because it is a trade secret." Berbecker testifies that they "are known in trade and commerce as gilt nails, and are bought and sold as such;" but this testimony applies only to the dealings of plaintiffs themselves. He says, "I can not swear that they are not bought and sold in trade and commerce of this country as upholstery nails, because *I do not know what other parties do.*" He claims to be able to state the general usage, but when he comes to describe it, this general usage is that "whenever a person asked *me* what was the price of nails, of gilt nails, or they might have asked for upholstery nails, *I knew that they meant gilt nails.*" He admits that they are sometimes dealt in under three other designations. The testimony of a witness who speaks only of

nish, statutory interpretation will become a most fruitful line of investigation.

Our opponent appropriately begins with a definition of "gild," from Webster's 1849 edition, which has since been abandoned by its editors, and survives only in the present litigation. The 1890 edition still, however, includes a corresponding definition of "gilt" which has been overlooked by our learned friend: "Golden yellow. '*Gilt* hair.'—*Chaucer*." If the legislators of 1883 were Chaucerian students, perhaps this may have been what they had in mind.

From the latest Webster our friend cites the definition, "To cause to look like gold." To this is appended the following quotation: "No more the *rising sun* shall *gild* the morn.—*Pope*." The same quotation is given by the Century Dictionary as authority for the following quaternary definitions: "To give a golden appearance or color to; to illuminate; to brighten; to render bright." It may be doubted whether a stove could be imported cheap as a gilt article under this definition if rubbed up with Sapolio; there could be no doubt, however, if Rising Sun Stove Polish were used.

Webster gives also a further definition of "gild:" "To give a fair but deceptive outward appearance to." This would enable the importation of a large variety of articles as gilt wares, and should strongly appeal to commercial men.

The Century Dictionary contains a secondary definition of "gild" which is appealed to: "To give the appearance of gold to, whether by means of actual gold leaf, or in some other way." But this is followed by illustra-

tions which involve Judge Lacombe's essential of "overlaying" one substance with another, "as by *lacquering* polished brass [or covering brass with a shellac varnish, Cent. Dict'y, p. 3324], bronzing with gold-colored bronze powder or the like." The dictionary then instructively proceeds as follows: "to distinguish *real gilding* with gold from the above," etc. If we are to depart from the ordinary and primary definition of "gilding," we must allow a further Century definition: "A rich golden color imparted to herrings by the use of hard wood only in smoking them;" perhaps, even, from the same dictionary, "Gilt, a young female pig." Space unfortunately prevents a full treatment of the subject.

It is respectfully submitted that, in the absence of any testimony as to American commercial usage in 1883, the courts should rest on the primary meaning known to Webster and the Century, the "real" meaning recognized by the latter, the only practical definition afforded us by Worcester; and should construe "gilt articles" to mean simply articles overlaid with gold. This is made especially clear by the company in which Congress has placed the "gilt articles" in the statute, with Britannia ware and plate. Neither lacquered brass nor powdered bronze can have been thought of in drawing up this paragraph, far less imitation furniture nails.

And it is therefore respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.